

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

COALITION FOR TJ

VS.

FAIRFAX COUNTY SCHOOL BOARD,
ET AL.

1:21-CV-296 CMH/JFA

ALEXANDRIA, VIRGINIA
JANUARY 18, 2022

TRANSCRIPT OF MOTIONS FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype, transcript produced by
Julie A. Goodwin.

A P P E A R A N C E S

FOR THE PLAINTIFF:

PACIFIC LEGAL FOUNDATION
By: MS. ERIN E. WILCOX
MR. CHRISTOPHER M. KIESER
930 G Street
Sacramento, California 95814
916.419.7111
ewilcox@pacificlegal.org
ckieser@pacificlegal.org

PACIFIC LEGAL FOUNDATION
By: MS. ALISON E. SOMIN
3100 Clarendon Blvd.
Suite 610
Arlington, Virginia 22201
202.557.0202
asomin@pacificlegal.org

FOR THE DEFENDANTS:

HUNTON ANDREWS KURTH LLP
By: MS. SONA REWARI
2200 Pennsylvania Avenue, NW
Washington, DC 20037
202.955.1500
srewari@huntonak.com

HUNTON ANDREWS KURTH LLP
By: MR. DANIEL R. STEFANY
951 East Byrd Street
Riverfront Plaza - East Tower
Richmond, Virginia 23219
804.788.8200
dstefany@hunton.com

OFFICIAL U.S. COURT REPORTER:

MS. JULIE A. GOODWIN, CSR, RPR
United States District Court
401 Courthouse Square
Alexandria, Virginia 22314
512.689.7587

1 (JANUARY 18, 2022, 10:00 A.M., OPEN COURT.)

2 THE COURTROOM DEPUTY: Civil Action Number 21-CV-296,
3 *Coalition for TJ versus Fairfax County School Board*.

4 Will counsel please note your appearances for the
5 record.

6 MR. KIESER: Christopher Kieser for plaintiff.

7 THE COURT: All right. Good morning.

8 MS. REWARI: Good morning, Your Honor, Sona Rewari.
9 Here with me is Daniel Stefany. We're here for the defendant.

10 THE COURT: All right. Good morning.

11 MR. KIESER: And at counsel's table with me are Erin
12 Wilcox and Alison Somin.

13 THE COURT: All right. Good morning.

14 MS. REWARI: Your Honor, this is here on the parties'
15 cross-motions for summary judgment. The Coalition's arguments
16 in its briefs are heavy on rhetoric but light on the facts.
17 There is zero evidence in the record that any of the changes to
18 TJ admissions were intended to target Asian students. There is
19 also zero evidence that the changes have burdened Asian
20 students differently than their non-Asian peers.

21 The plan applies to all students at all schools.
22 No one is treated differently because of their race. The plan
23 uses four factors that have no demonstrated correlation to
24 race. That's not a racial proxy. It's called the race neutral
25 alternative, which is exactly what the Supreme Court has said

1 schools should be trying instead of using race.

2 There is zero evidence that anyone knew or
3 predicted what the first TJ class would look like. No one
4 could. That's why the predictions in the Coalition's complaint
5 were so far off base.

6 Scrapping an old process and trying something
7 different in the hope that all racial groups will have equal
8 access is not racial balancing. The board adopted a plan that
9 expressly prohibits racial balancing, and that was effectuated
10 by a regulation that directs admissions evaluators will not be
11 given the race, ethnicity, or gender of applicants, making
12 racial balancing literally impossible.

13 The Coalition's zero sum theory that trying to
14 improve access for minorities is race discrimination against
15 the existing majority is just plain wrong, and the implications
16 of accepting such an erroneous view of the law are just
17 breathtaking. It would invalidate countless laws and measures
18 taken to promote equality of access, and it would calcify
19 systems that produce inequitable results, and it would paralyze
20 schools and other institutions from trying to do better by
21 everyone. And that's not a Chicken Little sky is falling
22 argument. Even in the microcosm of TJ admissions, the
23 implications of the Coalition's argument are just staggering.

24 Before the fall of 2020, applicants to TJ had to
25 pay a \$100 fee and take a battery of three standardized tests.

1 The results of that process were lopsided by almost every
2 measure. Nearly 87 percent of FCPS students who got in came
3 from the same eight middle schools. The other 18 middle
4 schools hardly got any students in. A small sliver of
5 students, around one to two percent, qualified for free and
6 reduced meals. And that's in comparison to the whole school
7 division where almost 30 percent of students were free and
8 reduced lunch eligible.

9 An equally tiny proportion of students were English
10 language learners in a county that has a large proportion of
11 English language learner students, and even fewer receive
12 special education services. The proportion of females was also
13 low, around 41 percent. And the numbers of Black and Hispanic
14 students were extremely low.

15 The numbers were so low that the Coalition itself
16 called them unacceptable. And the Coalition itself said the
17 numbers, the Black and Hispanic students at TJ, should be
18 increased. But the legal position the Coalition has taken in
19 this case is that those unacceptable numbers must be accepted
20 because under its zero sum theory of admissions doing anything
21 to try to increase access to TJ for Black and Hispanic students
22 necessarily equates to discrimination against Asian students,
23 who are the largest racial group at TJ.

24 You don't have to be a constitutional scholar to
25 know that that is wrong. Common sense tells you that is wrong.

1 It's worth considering the implications of that
2 theory, though, because if the Coalition is right, then schools
3 are stuck with whatever systems they have in place, and schools
4 are required by law to track racial data, to track outcomes,
5 and performance of students. So even if what they see that
6 what they're doing is disadvantaging some racial groups, they
7 can't do anything about it. They can't any -- do anything to
8 mitigate that impact.

9 If the application fee for TJ was \$1,000 and
10 Fairfax thought, well, maybe that fee is discouraging Black and
11 Hispanic students from applying or preventing them from
12 applying, under the Coalition's theory the School Board could
13 not change that fee, because the change would have been
14 motivated by a desire to increase the number of Black and
15 Hispanic students getting into the school.

16 And that example is not far from reality. TJ had
17 an admissions process that uses standardized tests that you had
18 to ace in order to make it to the second round. Some families
19 spent thousands of dollars on prep courses for the test. The
20 Coalition admits, and the data confirms it, that the test had a
21 disproportionate impact on Black and Hispanic students and
22 economically disadvantaged students, yet the Coalition claimed
23 in its interrogatory answer that eliminating the standardized
24 test was discrimination towards Asian students.

25 Now, it's backed off that argument in its summary

1 judgment papers, but that example just illustrates the point.
2 The theory that trying to mitigate adverse impacts on
3 minorities is tantamount to discrimination against the majority
4 just has no limit.

5 Now, if you ask plaintiff, they'll say, oh, no,
6 well, there's lots of alternatives. But if you give -- if they
7 give you any specifics, I would submit any specific example
8 will trip the same wire. Any idea that is intended to increase
9 the numbers of Black and Hispanic students under their theory,
10 no matter the means chosen, runs into the same zero sum
11 problem. It's a classic catch-22. Kurt Vonnegut could not
12 have written this any better.

13 Sure, you can try to increase the number of Black
14 and Hispanic students, but if you want to increase the number
15 of Black and Hispanic students, you can't do it. And that's
16 why the Coalition has no solution in this case. There's no
17 proposed injunction. There's no expert to tell you what an
18 admission system that complies with the zero sum theory would
19 look like.

20 Yes, it did have a proposal before the lawsuit was
21 filed, and that proposal looks an awful lot like what the
22 school board actually did here. The Coalition expressly urged
23 the school board over and over again to adopt their proposal
24 and said, do this because it will increase the number of Black
25 and Hispanic students. But under its legal theory that it's

1 saying in this case, that proposal also would have run into the
2 same zero sum problem.

3 So, it's not offering that idea. It's not offering
4 any ideas of what an admission system should look like. And if
5 they're right, there is no solution because there's no way to
6 conduct selective admissions for TJ under their theory.

7 Remember, when this lawsuit was filed, it was filed
8 with the request to return to the old admissions process. But
9 last year the vendor discontinued two of the three standardized
10 tests, so they're not available.

11 Now, if the current policy is invalidated, then
12 what will this new system look like? What should it look like?
13 The Coalition can't tell you.

14 And what are the guiding principles for such a
15 system? It has no answers. But if the Coalition is right and
16 the current system is invalidated, then you can't have
17 selective admissions at TJ because you can't pick any
18 admissions system with an intention to make the level playing
19 field for all races and you can't pick a system that you know
20 will have a specific racial effect. That means that you can't
21 use standardized tests because, as the Coalition has admitted,
22 standardized tests have a disproportionate impact on Black and
23 Hispanic students and advan -- therefore, advantage White and
24 Asian students.

25 You can't do a lottery because, as you know from

1 the law of probabilities, that the results will approximate the
2 applicant pool, and the Coalition doesn't agree with that. You
3 can't use a race blind system that considers factors other than
4 race, which is exactly what TJ is doing currently.

5 So what does that leave? It leaves nothing.

6 And the last point I will say on the practical
7 implication is that if Arlington or Alexandria were to open
8 their own TJ tomorrow, they could implement exactly what
9 Fairfax is doing and use that same admissions plan under the
10 Coalition's theory. Why? Because there's no last year to
11 compare it to. You would not look at year one results of this
12 hypothetical new school with the baseline assumption that
13 Asians should get a proportion of seats that far exceeds their
14 share of the applicant pool. That's the assumption the
15 Coalition rests its entire case on, and it's unacceptably
16 wrong.

17 Plaintiff's claim fails as a matter of law because
18 the undisputed facts show that this group does not have
19 standing, and plaintiff cannot carry its burden to prove its
20 equal protection claim. There are no material facts in
21 dispute. Both sides have supplied the Court with voluminous
22 evidence. Most of it is in the form of public meeting minutes,
23 transcripts, and presentations.

24 The testimony that is in the record from the
25 superintendent, the admissions director, the chair of the

1 school board, it's uncontested. There is no witness who's
2 going to come in and tell you something differently than what
3 is already in the record, and the Coalition has not even tried
4 to controvert that testimony. So there's nothing further the
5 Court needs to hear to decide this case, and summary judgment
6 is appropriate.

7 I just want to expand on the standing issue, Your
8 Honor. Plaintiff's argument on standing boils down to this.
9 We don't have to show that we are a true membership
10 organization because we have members, but that's assuming the
11 conclusion. If you're claiming associational standing, you are
12 claiming that you are the representative of your constituents
13 who have standing in their own right. And a traditional
14 membership organization meets associational standing because it
15 is the representative of its members.

16 In a traditional membership organization, the
17 members are the ones who run the organization. They make the
18 decisions. They select leaders who make the decisions. They
19 serve in the leadership roles. They finance the organization,
20 all of which go to show that the members in the organization
21 are one in the same.

22 Just using the label of members is not enough. In
23 *Heap versus Carter*, the plaintiff organization also alleged it
24 maintained an active membership. In *Sorenson Communications*
25 *versus FCC*, which are both cited in our papers, the association

1 plaintiff also claimed to have members. But the Court looked
2 behind that assertion because the organization didn't look
3 anything like a traditional membership organization, and
4 neither does the Coalition. It looks nothing like it.

5 Unlike the plaintiffs in some other cases, you can
6 look at the *Harvard* case or the *Boston* case, which are also
7 admissions cases, the Coalition has no formal existence. It's
8 not registered with any government agency. It has no articles
9 of incorporation. It has no bylaws. It has no officers.
10 Sure, there are some individuals who are calling the shots for
11 the Coalition, but none of those individuals have standing in
12 their own right.

13 Exhibit 45 lists the members of the core and
14 leadership teams. None of those individuals have children who
15 are TJ eligible, other than Mr. Jackson. And his declaration,
16 as we pointed out, sinks their case both on standing and on
17 merits because his daughter identifies as Black. And even so,
18 Mr. Jackson says that the new admissions policy will
19 discriminate against his Black child, which is contrary to the
20 theory that the Coalition is arguing in this case. And it just
21 reveals really what the argument here, the grievance here, is
22 about giving all middle schools a fair chance of getting their
23 best students into TJ. It's not about race.

24 Now, the Coalition claims it has general members
25 too who are parents of Asian students, but those are just

1 supporters. They have none of the hallmarks of membership.
2 You can contrast the Coalition to the organization in *Hunt*
3 where the commission was totally a creature of the parties it
4 purported to represent. They alone elected the Commissioners,
5 they alone served as Commissioners, and they funded the
6 Commission.

7 These supporters of the Coalition calls their
8 general members, don't do any of that. They didn't elect the
9 leaders. They don't get to serve on the leadership. They
10 don't get to vote. They don't fund the organization. There's
11 no indicia of control whatsoever for this general membership.
12 And so the Coalition lacks standing to represent these parents,
13 and the two declarations that they've offered from Ying
14 McCaskill and Dipika Gupta can't establish standing.

15 And I would also point out that Ms. McCaskill is --
16 you know, she's not a member of the core or the leadership
17 team, and for that reason alone she's irrelevant. But Ms.
18 McCaskill doesn't even have a child in 8th grade. She has a
19 7th grader, and there's no allegation that the 7th grader even
20 meets the -- the criteria to apply to TJ.

21 Ms. McCaskill had an 8th grader when this lawsuit
22 was filed and that 8th grader was admitted to TJ. And so the
23 only child that -- that they're alleging Ms. McCaskill has that
24 would have -- might attend TJ one day, there's no allegation
25 that child is eligible.

1 And we have laid out the -- our arguments on the
2 equal protection claim. I don't want to repeat them for the
3 Court. I'm happy to address any questions, but our -- I think
4 the bottom line is they have to prove both a disparate impact
5 and a discriminatory purpose, and there isn't evidence of a
6 discriminatory impact and there isn't evidence of a
7 discriminatory purpose.

8 If the Court has any questions, I'm happy to
9 address them, but I don't -- I don't want to make you listen to
10 everything that's -- we've already argued in our brief.

11 THE COURT: All right. Thank you.

12 MR. KIESER: Good morning, Your Honor.

13 THE COURT: You can take off your mask.

14 MR. KIESER: Oh, I am so sorry.

15 Good morning, Your Honor. Chris Kieser for the
16 Coalition for TJ.

17 I want to address point by point what my friend on
18 the other side was arguing, so I'm going to start with their
19 position that there's no evidence in the record of
20 discriminatory intent. And I think that -- that betrays a
21 misunderstanding of the legal -- the legal standard here.

22 There's no requirement that there be animus shown
23 in the record against Asian-Americans. The requirement is that
24 the admissions -- the board changed the admissions process
25 because it would have a particular racial result, and as the

1 District of Maryland recently recognized in the *Association for*
2 *Education Fairness* case, when you -- when you change the
3 admissions process using proxies that are intended to effect
4 the racial composition of the school, so -- and into the
5 detriment or to the -- for the advancement of particular races
6 any the detriment of others, that is discriminatory intent.

7 Further, there are several -- the entire record
8 demonstrates that racial balancing was at the forefront of what
9 was going on here. The impetus to change the process started
10 when the -- TJ's principal used the occasion of the release of
11 admissions data to send a message to the TJ community
12 reflecting that the racial composition of -- lamenting that the
13 racial composition of FCPS did not -- or TJ did not reflect
14 FCPS. Then two board members followed up and called the
15 admissions data unacceptable on racial grounds. They promised
16 intentful action. Then from the beginning, staff presentations
17 to the board were always couched as ways to improve the racial
18 balance of TJ, always to the detriment of Asian-Americans.

19 My friends on the other side say that the -- that
20 the board didn't have any data to predict the result of the
21 actual admissions process that was -- that was implemented.
22 But over the course of several proposals, data was produced to
23 the board, voluminous data and modeling, all showing that every
24 proposal that staff produced to the board would have a
25 disparate impact on Asian-American students.

1 The Merit Lottery, for instance, was regionally
2 weighted so that Asian-American students would not -- would not
3 gain as many seats as they would under even a pure lottery
4 system. And in a May white paper, the staff presented a three
5 pathway system to the board, and the third pathway was
6 explicitly -- students selected to the third pathway for
7 being students at underrepresented middle schools were
8 specifically selected or were the proposed -- proposal was to
9 specifically select them using a -- the analysis for the second
10 pathway, rather than the first, specifically because they were
11 concerned with racial diversity and not just geographic
12 diversity, as the board now claims.

13 The board then voted overwhelmingly in October to
14 direct FCPS staff to include a diversity report that they had
15 to submit to the governor to state that their goal was to have
16 TJ represent the demographics of Northern Virginia. Board
17 member e-mail showed a consensus that the primary reason TJ
18 admissions had to be changed was because of the racial balance,
19 and some board members emphasized that it had to be done
20 immediately and that they had to prefer equity over equality,
21 meaning treating each individual the same.

22 Board text messages also understand that some
23 board -- or show understanding among some board members that
24 the process had been anti-Asian, and that Superintendent
25 Brabrand had blamed Asian-Americans from the beginning, that

1 the Asian-American community in Fairfax County hates the school
2 board, and that the process discriminates against
3 Asian-American students.

4 Staff e-mail show that when the scoring system was
5 developed it was designed so that Asian-American applicants
6 would disproportionately not obtain the bonus points for the
7 experience factors that -- that would increase their -- the
8 total points for their application. Documents demonstrate the
9 board received substantial racial data, and that includes race
10 data by middle school which would have enabled the board to
11 understand the racial impact of the 1.5 percent plan. Even the
12 board transcripts that the board says in their brief contain no
13 statements demonstrating race -- that this is a race-based
14 action, show that the -- several of the board members, they
15 didn't consider Asian-Americans to be students of color. And
16 they found that at TJ, even though a school is 80 percent
17 non-White, they found that TJ was unwelcoming for students of
18 color.

19 And all -- a clear majority of the board members in
20 those transcripts also, as we cite in our response brief,
21 demonstr -- show that the reason they're doing -- that the
22 reason they were doing this was not simply to obtain geographic
23 diversity, but to change the racial makeup of the school and
24 that would have a detrimental effect on the Asian-American
25 students.

1 I think next my friend on the other side said that
2 the -- that these are not racial proxies because they do not
3 hurt Asian-Americans specifically. I think I would point the
4 Court there to -- to paragraph 10 of Mr. Shughart's
5 declaration, which is Exhibit 51 to their summary judgment
6 brief. He -- the -- includes these four charts on the
7 percentage of applicants who -- for the class of 2025 who would
8 get the bonus points for each of the four experience factors.
9 And it's clear here that the percentage of Asian-Americans
10 who -- who get each one of these bonus factors is substantially
11 lower than the percentage of Asian-Americans in the applicant
12 pool for the class of 2025. And that shows that the -- that
13 the experience factors have a disparate impact on
14 Asian-American students.

15 And then of course the 1.5 percent plan was --
16 targeted schools that had substantial Asian-American admissions
17 to TJ in the past several years. And you only have to look at
18 a couple of these middle schools such as Carson, Longfellow,
19 Rocky Run. These schools had students who are 60 to 70 or even
20 80 percent of the students who apply were Asian-American, and
21 they're the ones who now because their school had so many
22 applicants to TJ who were eligible were now thrown into this
23 unallocated pool where they're also forced to compete in the
24 unallocated pool against students who receive these bonus
25 points. So there's no wonder why the percentage of

1 Asian-Americans dropped from 73 percent in -- for the class of
2 2024 to 54 percent for the class of 2025. These -- these
3 criteria were specifically designed to make that happen.

4 The next thing I want to -- want to go -- want to
5 respond to is their point that the -- there's nothing that a
6 school board could do to increase equality of access for Black
7 and Hispanic students if we win. That's simply not true.
8 Their main point about the application fee, like if it were
9 \$1,000 and they reduced it to zero, that would be race
10 discrimination, if they did it because they wanted to increase
11 the number of Black and Hispanic students who would apply.
12 That's just wrong. The -- if the application fee were zero for
13 everyone that would treat each student equally in the
14 application process. And that's not racial discrimination,
15 even if you suggest that you're doing it because you want to
16 increase the number of Black and Hispanic students who would
17 apply.

18 The problem with this process is that it doesn't
19 treat each student equally. It treats students differently
20 based on factors that are intended to correlate with race, such
21 as the middle school they attend, whether they are -- whether
22 they qualify for any of the other experience factor bonuses.
23 That's the problem here.

24 And the reason it -- it's the means and the --
25 the -- and the motive combined, so the motive was to create

1 racial balance at the -- to the detriment, of course, of
2 Asian-American students who were the only racial group
3 performing above the -- their share of the applicant pool
4 before this process was changed.

5 And the means chosen were racial proxies designed
6 to make it more difficult for similarly situated Asian students
7 to get into TJ. That is the discriminatory intent that we have
8 argued. There -- as *McCrory*, the Fourth Circuit's *McCrory*
9 decision clearly states, there's no requirement that racial
10 animus be at play. In that case, there was no comment by any
11 legislator suggesting that the election law challenged in that
12 case was passed to discriminate against Black voters, yet the
13 Fourth Circuit applied *Arlington Heights* and found that the
14 legislator -- the legislature passed the law to entrench itself
15 and targeted Black voters because they did not vote for the
16 majority party.

17 The same can be said for this case, that the
18 pursuit was a racial balance, and because Asian-Americans were
19 the majority, the system that was passed targeted them to
20 reduce their proportion of the -- of the admitted pool in order
21 to obtain the racial balance the board wanted.

22 The -- I think -- I think that they also argue
23 there that there's -- that there's no -- that if a new school
24 were to start today that were analogous to TJ that there would
25 be no equal protection claim. And I don't think that's true

1 either. It's not necessarily just the comparison between 2025
2 and 2024 that drives the disparate impact here, but it's also
3 the use of these -- these proxy factors with the intent to
4 create racial balance to the detriment of Asian-American
5 students.

6 If you have that, even in year one, I think -- I
7 think that the comparison certainly amplifies the disparate
8 impact in this case, but if you had what we have here even in
9 year one, I think there would still be a claim. I just think
10 that the board's position that -- our position -- the board's
11 position that -- that anything that you might do to attempt to
12 increase access is simply wrong, and I think that's -- that's
13 just an overreaction.

14 For instance, even the board -- board members
15 recognized that there was something to be done regarding the
16 pipeline to TJ and increasing the -- the quality of the K
17 through 8 schools so that eventually each middle school would
18 be able to -- equally comp -- students from each middle school
19 would be able to equally compete and send a lot of students to
20 TJ. The board even moved a proposal, as the -- as the board
21 cites in their brief on October 22nd, to -- to address those
22 pipeline issues. So -- and some board members in text messages
23 they -- they understood that.

24 You know, they asked: Why aren't we asking why
25 people don't apply? Why are we trying to fix the access

1 problem instead of overhauling the admissions process?

2 So, there's -- there's two separate issues there.
3 You can address access without discriminating on the basis of
4 race. And the racial proxy here, you know, is -- is equivalent
5 to -- and that's why *Arlington Heights* exists because not all
6 racial discrimination will be overt, and some -- so there -- if
7 a factor is adopted in order to produce a particular racial
8 result, that is discriminatory intent under the law. And I
9 think the District of Maryland opinion in *Association for*
10 *Education Fairness* lays that out very well.

11 I think her friend on the other side next said
12 that -- that the Coalition didn't have a plan to replace the
13 old admissions -- the old admissions process, or hasn't
14 presented the Court with a plan. That's not the Coalition's
15 job to -- to create a plan for TJ admissions that would be
16 constitutional. If the -- the Court can enjoin the current
17 process and then the board can go back and create a new
18 process. It's not our -- we don't -- we don't claim to, you
19 know, have that authority or I don't think we need to present a
20 new process.

21 And with respect to the second look proposal that
22 the other side referenced in -- in respect to the Coalition's
23 hope that it would increase diversity, I mean, the Coalition
24 actually does want more Black and Hispanic students at TJ.
25 It's the means that were chosen and the -- and the way it

1 was -- the way it was done that discriminates against
2 Asian-American students. It's not the overall hope that more
3 Black and Hispanic students would attend TJ, which I think we
4 all share.

5 So, the second look proposal, as Mr. Miller
6 testified in the 30(b)(6) deposition, was intended as a
7 compromise or an attempted sort of bridge the gap between the
8 Coalition's position and the proposed Merit Lottery that was
9 proposed by Superintendent Brabrand in September. There is
10 no -- there's nothing in the record to suggest that the second
11 look proposal would -- and in fact, Mr. Miller testified that
12 the second look proposal was not the Coalition's preferred
13 outcome. It was the Coalition's attempt to engage the board
14 and move the discussion toward the center. So there's
15 no -- this -- our legal position is not inconsistent with the
16 Coalition's actions while the -- while the admissions changes
17 were in progress.

18 I think -- we'll move on to -- we can move on to
19 standing just for -- just for a little bit, unless the Court
20 has -- well, unless the Court has other questions for us. But
21 as far as the membership organization question goes, I think
22 the board has it backwards. The cases they cite, including
23 *Heap*, are cases where -- and even in *Heap* itself there was
24 no -- no -- there were no alleged members, even in the
25 complaint in that case, even though there was a general

1 allegation of being a membership organization.

2 Here, we have a complaint where members are
3 included, and then Ms. McCaskill who actually, I believe, is a
4 member of --

5 Isn't that a member of the core team?

6 MS. WILCOX: (Nods head.)

7 MR. KIESER: (Continuing) Her -- her -- she also goes
8 by the name Julia, but that's -- and which is -- which was --
9 is evident in some of the papers we produced, but she's on
10 the -- on the -- on the core team. But I don't -- we don't
11 believe that that matters.

12 The Coalition has -- in the record it has members,
13 and most importantly, I think, Your Honor decided in May with
14 much the same evidence before -- before you that the Coalition
15 was a membership organization entitled to bring this lawsuit.
16 Before you then you had the declarations of Ms. McCaskill and
17 of Ms. Nomani on behalf of the Coalition where -- and
18 Ms. Nomani did -- said in that declaration that the Coalition
19 did not have incorporation documents and that there was --
20 there were no dues and other formalities. And Your Honor still
21 found that I believe under the preliminary injunction it --
22 with it not -- not under the plausibility standard or the
23 motion to dismiss, but found that we had standing.

24 The facts are no different now. There's nothing in
25 the record that changes the fact that the Coalition is a

1 membership organization, and we don't have to prove that we're
2 the functional equivalent of a membership organization because
3 we are a membership organization.

4 And there -- there -- the questions that the --
5 that the board raises about the -- the membership simply I
6 think amount to misrepresentations of Ms. Nomani's deposition
7 testimony. She -- I mean, for instance, she test -- testified
8 that the Coalition has a membership team that vets members,
9 does not allow -- doesn't allow everyone who clicks the Get
10 Involved button to become a member, but it actually does -- has
11 projected people before. People have left the Coalition
12 because the Coalition doesn't represent them. Members have
13 produced declarations saying that they're members. There's
14 no -- never been any confusion over who was -- who are the
15 members of the Coalition. And -- and that's why I think the
16 Court held back in May that the -- that the Coalition is a
17 membership organization entitled to bring this lawsuit.

18 Unless you have any further questions, we will -- I
19 don't want to keep repeating what's in our brief, so.

20 THE COURT: All right. Let me ask you this. I mean,
21 do you agree that there are no material facts in dispute? Is
22 this case ready for me to decide?

23 MR. KIESER: Yes, Your Honor. I think the record
24 we've produced with -- with all the documents attached to both
25 the summary judgment briefs, that -- to us, that demonstrates

1 that we -- that we are entitled to summary judgment. And I
2 don't believe that testimony -- for instance, testimony from
3 the board members would add anything because even under
4 *Arlington Heights* and *McCrary*, post-enactment statements by
5 legislators are not considered relevant to discriminatory
6 intent. So, what we have here is --

7 THE COURT: All right.

8 MR. KIESER: -- is the record that the case should be
9 decided on in our view.

10 THE COURT: All right. Thank you.

11 MS. REWARI: I was very glad to hear Mr. Kieser agree
12 that if the application fee were reduced to zero that that
13 would not -- in the example that I gave, that would not be
14 discrimination because reducing the application fee or using
15 experience factors or using middle school, there's no
16 difference. Because in order to have to call any of these
17 things a racial proxy, you have to show a very high correlation
18 between the factor and race. To call it a proxy is to say that
19 using that factor tells you something about the person's race.
20 And middle school attendance does not tell you anything about
21 FCPS student's race in this case. We've shown that.

22 And using free and reduced lunch eligibility does
23 not tell you that that student is Black or Hispanic or Asian.
24 The data shows that the majority of students -- excuse me --
25 the largest racial group of students that had that factor were

1 Asian, and for every factor there were -- Asian students were
2 either the largest or the second largest. So this idea that
3 these experience factors are any different than going from
4 \$1,000 fee to a zero fee or a \$100 fee to a zero fee, it's
5 any -- there -- there's no difference.

6 The plaintiff has to show an invidious
7 discriminatory intent, and it has to show that that invidious
8 discriminatory intent was a substantial motivating factor. And
9 we agree that they -- they don't have to go so far as to show
10 hatred of Asian-Americans, but they do have to show a desire to
11 harm Asian-Americans. That evidence is necessary because
12 motive to increase access for minorities and to level the
13 playing field is not suspect.

14 The Supreme Court in *Feeney* has recognized that
15 there's an important distinction between action taken because
16 of an adverse impact on a group and action taken in spite of
17 such an adverse effect.

18 The Coalition needs to proffer evidence that the
19 board changed the admissions process because it wanted to harm
20 Asian students. It doesn't have it. No such evidence exists.

21 They talked about the text messages. The text
22 messages are between two board members who are being sensitive,
23 were sympathizing, were talking -- making pro-Asian comments
24 about hardworking immigrants, families who put education first,
25 and saying they're being discriminated against in this process

1 too in the sense that the old process hurts poor Asian families
2 as well.

3 The point we're making, it's not about race.
4 There's no evidence to the contrary that there was any desire
5 to harm Asian-Americans on -- or any board member.

6 Now, the Coalition was just trying to move the goal
7 post. They came into this lawsuit saying this was about
8 harming Asians. Now they say, oh, no, actually that's not the
9 standard. All we have to do is to show the board wanted to
10 change the racial makeup of the school, nevermind that it
11 doesn't have evidence that that was motivating a majority of
12 the board.

13 But even assuming the Coalition had such evidence,
14 it would not be enough. Trying to give all racial groups equal
15 access is not an invidious discriminatory purpose. Wanting a
16 racial effect is not the standard. This is just another way to
17 say the zero sum theory that we've talked about, their zero sum
18 argument collapses any distinction that the Supreme Court drew
19 in *Feeney* and turns every in spite of case into a because of
20 case.

21 That's not the law. It has no limiting principle.
22 Every action, every policy, every law that tries to equalize
23 access and opportunity to create a level playing field for all
24 races would violate the equal protection clause under their
25 theory, because it can always be said that leveling the playing

1 field to remove disadvantages that keep some groups out
2 technically will have an adverse effect on the groups that are
3 not hobbled by the same disadvantages.

4 Now, if this argument was being made by White
5 applicants, I think the wrongness of it would just be even
6 starker. *Hayden versus Nassau County*, which we cited in our
7 papers, in that case this argument was made by White applicants
8 who claimed that changing the police department entrance exam
9 to minimize the adverse impact on Black applicants necessarily
10 discriminated against White and Latino applicants.

11 The Second Circuit said that the theory was wholly
12 insufficient to even state a claim under *Feeney*. Trying to
13 create a process that mitigates adverse impact and improves
14 Black applicants chances of selection is just not akin to
15 intentional discrimination against Whites. The touchstone of
16 equal protection clause is unequal treatment of racism.

17 They keep saying, well, students are not treated
18 the same. They're not treated differently because of race.
19 Yes, students are given additional points if they -- if they
20 are -- come from a family that has to get assistance with
21 meals. And you know what? That's an educational judgment the
22 school board is making that a 4.0 from a student who has to
23 worry about meals is different than a 4.0 from a student who
24 doesn't. That's an educational judgment, and they're free to
25 make that judgment.

1 Government actors are free to use race neutral
2 means to improve racial and gender representation. There's no
3 evidence that that factor tells you the race of a student. The
4 Supreme Court said this in *Parents Involved* that government
5 actors can use race neutral means to change the racial
6 composition of schools. And Justice Kennedy's concurrence
7 explains that public schools may adopt policies to effect the
8 racial composition of a school as long as the policies do not
9 treat students differently on the basis of race.

10 This policy doesn't. It's fully in line with all
11 the examples that Justice Kennedy gave, and it's no different
12 than the examples that Justice Roberts listed. I mean, he
13 noted considering poverty as -- or using the lottery as
14 examples of race neutral alternatives the schools can consider.

15 I mean, the one percent plan in *Fisher* was not even
16 challenged as racially discriminatory. They were challenging
17 the use of racial classification. The other part of *Fisher* is
18 what's at issue. The one percent plan is not even an issue in
19 *Fisher*.

20 And the Coalition can't explain to you why the one
21 and a half percent plan is any different from any of these
22 examples in *Parents Involved*. All they -- they are left to
23 argue is, well, you're treating students differently. But
24 they're not being treated differently on the basis of race, and
25 there isn't evidence that what you're using to treat students

1 differently has a strong correlation to race. And that is what
2 they would have to show. The challenge, the use of only one
3 experience factor, and that was underrepresented schools. And
4 we showed in the papers that that factor advantaged Asian
5 students.

6 I mean, there are only two schools where that
7 factor helped -- could have potentially helped students get
8 unallocated seats. And the students that came from those two
9 schools were 55 -- more than 50 percent Asian. 13 out of 25
10 students were Asian from those schools.

11 So, they don't have the data to show you that, and
12 there's no -- you can't even draw a distinction between our
13 case and the *Anderson* from the First Circuit that we have
14 cited. And every circuit that has had this question, the First
15 Circuit, the Third Circuit, the Fifth Circuit, and the Sixth
16 Circuit have all said that you can do race neutral methods to
17 change the racial composition of schools.

18 Judge Trenga just recently held this in *Boyapati*
19 that was decided just last year. No Court of Appeals has
20 declined to follow the principles of *Parents Involved*.

21 Zero sum logic is just not limited to school
22 admissions. They try to act like, well, there's something
23 unique about it. But societal resources are finite by their
24 very nature, and under their theory none of these societal
25 problems can ever be solved because you can never do it. And

1 the attempt to compare this case to *McCrory* is just -- it's
2 almost laughable.

3 I mean, *McCrory* involved a law that limited the
4 ways of voters in North Carolina could cast their ballots. The
5 facts, they have -- rang every bell under *Arlington Heights*.
6 None of those bells are even tinkling here.

7 There was a long history of discrimination against
8 Blacks in that case. No such history of discrimination against
9 Asians in Fairfax County.

10 The law only applied to the voting mechanisms that
11 were disproportionately used by Black voters. The legislatures
12 had that data in hand when they picked -- cherry picked just
13 those mechanisms to target. There's no evidence like that. In
14 fact, they admit in their brief that it's true that FCPS never
15 ran any specific simulation of the racial effect of the adopted
16 changes.

17 In *McCrory*, the bill was unveiled to the public and
18 voted into law along strict party lines in just three days
19 without any amendments. Here, it took three months, and the
20 superintendent's lottery proposal where we started was nothing
21 like where the board ended up. The board rejected the lottery
22 and asked for -- asked for non-lottery, and then it didn't even
23 go with the superintendent's non-lottery idea.

24 So, the purpose of this plan is obvious. It's to
25 give the top students from every part of Fairfax County and the

1 participating divisions a meaningful opportunity to attend TJ
2 and to recognize the challenges such as poverty, English --
3 learning English as a foreign language, disabilities, and where
4 you go to school should be recognized as challenges the student
5 has overcome to get there. And there's no case in which a
6 court has applied strict scrutiny to a policy that was adopted
7 to secure equal treatment of all applicants, regardless of
8 race. So we would ask the Court grant summary judgment in
9 favor of the school board.

10 THE COURT: All right. Very well. I've obviously got
11 to look at this further.

12 Both of -- you both agree that there's no dispute
13 in these facts, so this case will be taken off the trial docket
14 for next week. And I'll get an answer to you-all as quickly as
15 I can.

16 MS. REWARI: Thank you, Your Honor.

17 THE COURT: We'll adjourn until tomorrow morning at
18 10:00 o'clock.

19 THE LAW CLERK: All rise.

20 (PROCEEDINGS CONCLUDED AT 10:44 A.M.)

21 -oOo-

22

23

24

25

1 UNITED STATES DISTRICT COURT)
2 EASTERN DISTRICT OF VIRGINIA)
3

4 I, JULIE A. GOODWIN, Official Court Reporter for
5 the United States District Court, Eastern District of Virginia,
6 do hereby certify that the foregoing is a correct transcript
7 from the record of proceedings in the above matter, to the best
8 of my ability.

9 I further certify that I am neither counsel for,
10 related to, nor employed by any of the parties to the action in
11 which this proceeding was taken, and further that I am not
12 financially nor otherwise interested in the outcome of the
13 action.

14 Certified to by me this 28TH day of JANUARY, 2022.
15
16
17

18 /s/
19 JULIE A. GOODWIN, RPR
20 Official U.S. Court Reporter
21 401 Courthouse Square
22 Eighth Floor
23 Alexandria, Virginia 22314
24
25

INDEX

January 18, 2022

PAGE

Argument by Ms. Rewari.....	3
Argument by Mr. Kieser.....	13
Further Argument by Ms. Rewari.....	25
Reporter's Certification.....	33

- * - * - *